91-1495

Supreme Court, U.S.
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Number ____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

Anthony J. Burkhart and Carmella L. Burkhart,
Petitioners

v.

Allen L. Davies, M.D., John T. Oglesby, M.D.,
and Medical Center of Delaware,
Inc., a Hospital Corporation of the State of
Delaware,
Respondents

Petition for Writ of Certiorari to the Delaware
Supreme Court

Petition for Writ of Certiorari

Anthony and Carmella Burkhart
7 Cavallero Court
New Castle, DE 19720
(302) 324-1880

Question Presented for Review

Did the Delaware Supreme Court deprive Petitioners of their due process right to trial by affirming summary judgment when genuine issues of material fact existed?

Parties

Petitioners are Anthony Burkhart and Carmella Burkhart. Respondents are Allen L. Davies, M.D., John T. Oglesby, M.D., and Medical Center of Delaware, Inc.

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Jurisdiction

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States.

28 U.S.C. § 1257 (1992).*

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*When construing a state statute, a state court, like the legislature which enacted the statute, may not deprive a citizen of due process of law. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680-82 (1930). Accordingly, Your Honorable Court has jurisdiction to decide cases arising from a petition that the state court's interpretation of a state statute deprived petitioner of federal due process rights. *Id.* at 681-82. *Cf. McKesson v. Division of Alchoholic Beverages & Tabacco*, 110 S.Ct. 2238, 2246, n.12 (1990)(*quoting Robb v. Connolly*, 111 U.S. 624, 637, (1884)(if state court fails "'to guard, enforce, and protect every right granted or secured by the Constitution of the United States,'" aggrieved party may petition Supreme Court of the United States for final resolution).

Delaware Superior Court Civil Rule 56, the interpretation of which is at issue in this petition, has the force of a statute, Del. Code Ann. tit. 10, 561 (c), (d)(1992), therefore this Petition is properly before Your Court.

Constitutional Provisions

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Statement of the Case

On February 20, 1984, Allen L. Davies, M.D. examined Anthony J. Burkhart to determine the presence of thoracic outlet syndrome. On that same day, Dr. Davies told Mr. Burkhart that it was necessary for him to have an arteriogram, the results of which would determine whether or not Mr. Burkhart suffered from thoracic outlet syndrome. On February 27, 1984, at Medical Center of Delaware, Inc., John T. Oglesby, M.D. administered the arteriogram by injecting opaque into Mr. Burkhart's right subclavian artery.

After the operation, Mr. Burkhart, who was then thirty-three years old, returned home where he suffered a severe reaction to the arteriogram, including vomiting and a three to four minute loss of consciousness. He was transported to the hospital emergency room where a surgical resident diagnosed vaso-vagal syncopal attack, post arteriogram. He was admitted for twenty-four hours and discharged. As a result of the arteriogram, and in addition to his other injuries, Mr. Burkhart has lost the ability to enjoy normal sexual relations with his wife, Carmella.

On February 26, 1986, Mr. and Mrs. Burkhart filed their complaint alleging Respondent doctors and hospital were negligent in their care of Mr. Burkhart before, during and after the administration of the arteriogram. Mrs. Burkhart's claim against Respondents

is for loss of companionship and normal marital relations. During the pretrial proceedings, Petitioners named Dr. Haines (among others) as an expert to be called at trial.

On January 11, 1991, eleven days before the jury trial was scheduled to begin, Respondents Davies and Oglesby deposed Dr. Haines. Respondent Medical Center of Delaware, Inc. was not present at the deposition. In response to a question from counsel for Dr. Oglesby, Dr. Haines stated:

> A. The opinion I have is that Dr. Oglesby did not see the patient. I don't see evidence of that. To me that is a flaw.
>
> Q. You think that's a violation of the standard of care for a radiologist in Delaware?
>
> A. Yes, under these circumstances.

Transcript of Dr. Haines' Testimony, 1/11/91, at 29. Dr. Haines later opined that the failure of the physicians and hospital to properly examine Mr. Burkhart prior to the arteriogram, and afterwards, to follow his condition and attempt to determine why he had reacted to the arteriogram, and to assess the extent of Mr. Burkhart's injuries, was a violation of the applicable standards of care.

The Respondents moved for summary judgment, arguing Petitioners had no expert medical testimony as Delaware law requires.

On January 17, 1991, the Superior Court heard Respondents' motions. During the hearing, none of the three Respondents testified as to the applicable standard of care or whether they comported with that standard. At the conclusion of the hearing, the Court granted all three Respondents' motions for summary judgment. On February 22, 1991, Petitioners appealed the Superior Court's order *pro se*.

On December 20, 1991, the Delaware Supreme Court affirmed the trial court's granting of summary judgment. The Delaware Supreme Court ruled that: Petitioners had completely failed to prove the elements of their case; Respondents were not required to produce expert medical testimony in support of their motions for summary judgment; and summary judgment against Petitioners would stand, although the ruling on summary judgment was made within ten days of the Respondents' motions. In reaching its conclusion, the court expressed that, "[t]he record reflects that, within a few days of trial, the Burkharts had no medical expert who would testify in support of the allegations of negligence in their complaint." *Burkhart v. Davies et al.*, No. 58, 1991, slip op. at 8 (Del. Dec. 20, 1991). The court had before it, in Petitioners' appellate brief, direct citations to Dr. Haines' testimony that: Respondents performed below the applicable standard of care; Mr. Burkhart was injured; and Respondents caused Mr. Burkhart's injuries.

Transcript of Dr. Haines' Testimony, 1/11/91 at 29-31.

The Delaware Supreme Court ignored genuine issues of material fact and deprived Petitioners of their due process right to trial. Mr. and Mrs. Burkhart petition this Honorable Court for due relief: to vacate the Delaware Supreme Court's order of December 20, 1991 and to enter an order to the Delaware Supreme Court that the Burkharts must be allowed to bring their case to trial.

Reason for Granting the Writ of Certiorari

The Delaware Supreme Court Deprived Petitioners of Their Due Process Right to Trial by Affirming Summary Judgment When Genuine Issues of Material Fact Existed.

A. Due Process Includes the Right to Trial.

Due process includes the right to have one's factual disputes determined at trial, by a fact finding tribunal.

> A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement

> of the Constitution is met if the trial is had according to the settled course of judicial proceedings. *Murray's Lessee v. Hoboken L.& I. Co.*, [59 U.S. (18 How.) 272, 280 (1856)]. Due Process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land, - that is to say, with the Constitution and laws of the United States made in pursuance thereof, - or with any treaty under the authority of the United States. Art. 6 Const. Here the state court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States.

Walker v. Sauvinet, 92 U.S. 90, 92-93 (1875). If a government actor, even a court, *see Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680-82, departs from "historical practice," it may "deny due process." *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032, 1050 (1991)(Scalia, J., concurring).

Accordingly, whether Petitioners' due process

rights were violated depends on whether the right to a trial is a fundamental right of Delaware citizens. The right to a trial is well entrenched in Delaware law. *See generally Lecates v. Justice of Peace Court No. 4*, 637 F.2d 898, 909 (3rd Cir. 1980)("In Delaware, the right of trial by jury is deemed to be a fundamental liberty.").[1]

---

[1]The Delaware Supreme Court also denied Petitioners' due process right by failing to enforce Delaware Superior Court Civil Rule 56(bb). Due process includes the opportunity to be heard, which "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). By holding a summary judgment hearing within ten days after Respondents' motions, the Superior Court departed from Superior Court Civil Rule 56(bb), which is meant to safeguard a litigant's right to preparedly participate in a full and fair hearing. Rule 56(bb) allows a hearing to proceed within ten days of a summary judgment motion *only* "as a result of a pretrial conference" *and* if the trial court believes such timing is desirable. *Id.* Because the parties did not participate in a pretrial conference, the first prerequisite is absent. The Rule 56(bb) exception was misapplied.

Additionally, the early hearing severely prejudiced Petitioners. *See Wahle v. Medical Ctr. of Del.*, 559 A.2d 1228, 1234 (Del. 1989)(for relief from an unjustifiedly expedited summary judgment hearing, aggrieved party must show prejudice). Petitioners were not earnestly represented by trial counsel. Had Petitioners had the opportunity to seek new counsel, they could have had a competent and diligent representation at the hearing. Instead, trial counsel faltered and perhaps even swayed the Superior Court, and the Delaware Supreme Court, into believing counsel's opinion of the case instead of analyzing the true underlying facts. Faced with an

Moreover, the Delaware Supreme Court has denied Petitioners their right to a *trial by jury*.

> The Declaration of Rights and Fundamental Rules of Delaware § 13 (1776) proclaims "That trial by jury of facts where they arise is one of the greatest securities of the lives, liberties and estates of the people." This principle is embodied in Art. I, § 4 of the State Constitution, which provides for a right to a jury trial in civil cases as it existed at common law.

Lecates at 909. Because Delaware's constitution declares the right of its citizens to a jury trial, taking away that right deprives the citizen of due process of law, guaranteed by the Fourteenth Amendment of the United States Constitution. *Id.*

Any encroachment on the fundamental right to trial is a violation of due process. *duPont v. Southern Nat'l Bank of Houston*, 771 F.2d 874, 880 (5th Cir. 1985), cert. denied, 475 U.S. 1085 (partial summary judgment deprived appellants of due process "right to fully and fairly litigate each issue in their case"). "Every time summary judgment is granted where, after an actual trial,

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expedited hearing, Petitioners were without fair resources to adequately represent themselves. By affirming the lower court, the Delaware Supreme Court deprived Petitioners of due process.

directed verdict could not have been, there has been a violation of the constitutional right to jury trial because of a misprediction of the trial record." D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 Brook. L. Rev. 35, 41 (1988).

B. Petitioners' Right to Trial Was Denied.

The Delaware Supreme Court deprived Petitioners of their due process rights by denying them a trial on the merits of their case. Whether Respondents' care for Mr. Burkhart fell below the applicable standard is an issue properly decided at trial.

1. In Delaware, the existence of a genuine issue of material fact precludes summary judgment.

In Delaware, a party is entitled to summary judgment only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Del. Super. Ct. Civ. R. 56(c).

> It is elementary, of course, that a summary judgment may be granted only if, on undisputed facts, the moving party establishes that he is entitled to that judgment as a matter of law. Any

> application for such a judgment must be denied if there is any reasonable hypothesis by which the opposing party may recover, or if there is a dispute as to a material fact or the inferences to be drawn therefrom.

Vanaman v. Milford Memorial Hospital, 272 A.2d 718, 720 (Del. 1970). *See also Schagrin v. Wilmington Med. Ctr.*, 304 A.2d 61, 63 (Del. 1973)(summary judgment is appropriate "only if the undisputed facts indicate that the moving party is entitled to judgment as a matter of law"). When reviewing the grant of summary judgment, the Delaware Supreme Court must view the record in the light most favorable to the nonmoving party. *Baylis v. Wilmington Med. Ctr.*, 477 A.2d 1051, 1057 (Del. 1984); *Baoust v. Kraut*, 377 A. 2d 4, 7 (Del. 1977); *Schagrin* at 63. Alternatively stated, the reviewing court may not interpret any inferences against the nonmoving party. When deciding a summary judgment motion, a judge is not empowered to decide the truth of the assertions made. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)("the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial"). At the summary judgment stage, the nonmoving party need only evince an issue of fact and need not *prove* the case. *Schagrin* at 63 (if dispute as to facts or inferences is shown, summary judgment should not be granted).

Delaware Superior Court Civil Rule 56 governs the procedure for moving for summary judgment, and the Delaware Supreme Court has settled precedent to determine what quantum of evidence is necessary to create a material factual issue. The quantum of evidence necessary to preclude summary judgment is not great. The Delaware courts have consistently applied the principle that the presence of disputed facts or inferences precludes summary judgment. *See, e.g., Thomas v. St. Francis Hosp., Inc.*, 447 A.2d 435, 437 (Del. 1982)(although plaintiff had a "weak" case, inference that plaintiff would be able to satisfy burdens given a second chance precluded summary judgment); *Baoust v. Kraut*, 377 A.2d at 7 (necessity of medical procedure employed by defendant doctor presented a critical question of fact; defendants were not entitled to judgment as a matter of law); *Harris v. Gallagher*, 375 A.2d 456, 458 (Del. 1977)(whether referral five months after lump was detected constituted sufficient follow-up was a question of fact; grant of summary judgment was erroneous); *Hurtt v. Goleburn*, 330 A.2d 134, 136 (Del. 1974)(because there was conflicting testimony as to defendant doctor's alleged negligence and towards the applicable standard of care, plaintiffs entitled to judgment on the merits); *Schagrin v. Wilmington Med. Ctr.*, 304 A.2d at 64-65 (relationship between defendants had not been fully explored, legal conclusion in favor of summary judgment

held erroneous); *Vanaman v. Milford Memorial Hosp.*, 272 A.2d at 720-22 (conflicting evidence regarding doctor's relationship with hospital rendered entry of summary judgment erroneous).

In this case, the Delaware Supreme Court relied on *Celotex Corp v. Catrett*, 477 U.S. 317 (1986). In *Celotex*, the plaintiff claimed injuries caused by exposure to the defendant's asbestos products. The evidence showing exposure was not "overpowering." *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 39 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1066 (1988). Nevertheless, on remand, the United States Court of Appeals refused to affirm the District Court's grant of summary judgment. "Considering the record before the District Court when it granted summary judgment - in particular, the four items discussed above - we believe that the issue of exposure was not so one-sided that Celotex was entitled to judgment as a matter of law." *Id.* at 39 (footnote omitted). The court reached that decision after analyzing several factors which combined to satisfy all of the elements that plaintiff needed to show to establish her cause of action. *Id.* at 39-40.

The Court of Appeals for the District of Columbia gave plaintiffs the benefit of every inference and connected all the evidence which, *in toto*, was held to establish plaintiff's case. *Celotex* defines the quantum of evidence necessary to overcome a summary judgment

motion.

2. There were material facts in dispute and Respondents were not entitled to judgment as a matter of law.

In this medical malpractice case, Petitioners were required to present expert testimony[2] "as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury." Del. Code Ann. tit. 18, § 6853 (1991). Petitioners profferred expert medical testimony as required by Delaware law. Dr. Haines' testimony created genuine issues of material fact: was the care Respondents gave Mr. Burkhart below the applicable standard?

Dr. Haines testified that Respondent doctors were negligent and that their negligence caused Mr. Burkhart's injuries. In his deposition, Dr. Haines opined that Dr. Oglesby violated the standard of care for a radiologist in Delaware. Transcript of Dr. Haines' Testimony, 1/11/91 at 29. He based his opinion on Dr. Oglesby's failure to

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[2]Any argument that respondents might have against Dr. Haines' qualifications is waived, as that issue was first raised on appeal to the Delaware Supreme Court. *See* Delaware S.Ct. Rule 8 (unless Delaware Supreme Court decides otherwise, "only questions fairly presented to the trial court may be presented for review").

provide Mr. Burkhart with medical advice both before admission and in reference to Mr. Burkhart's condition. *Id.* Dr. Haines also cited as negligent the Respondents' failure to sufficiently diagnose Mr. Burkhart to discern whether he was fit for the pending operation. *Id.* at 30-31. Also negligent, according to Dr. Haines, was that Respondents did not effectively monitor Mr. Burkhart after his operation. *Id.* at 31. The context of Dr. Haines' testimony provides reasonable inferences that Respondents' negligence caused Petitioner's injuries. *Id.* Dr. Haines testified further "[t]hat the probability existed that there had been some damage to his arterial and/or neurological system in the area of the abdomen." *Id.*

When the record is read in the light most favorable to Petitioners and when they receive the benefit of all reasonable inferences, as Delaware law requires, Petitioners complied with the statutory prerequisite to sustain their medical malpractice action against Respondents. This testimony raised a genuine issue of material fact, which is properly decided at trial.

C. The Delaware Supreme Court's Decision Will Wrongfully Affect Future Litigants.

If allowed to stand, the Delaware Supreme Court's decision in *Burkhart* will wrongfully affect future litigants. The Delaware Supreme Court already has relied upon

Burkhart in *Sostre v. Swift*, No. 263,1991, 1992 Del. LEXIS 37 (Del. Jan. 24, 1992), and *Burkhart* will likely be cited in future medical malpractice cases. In *Sostre*, the Delaware Supreme Court quoted *Burkhart* for the proposition that "'. . . when the record unambiguously reflects that the plaintiff's allegations are not and will not be supported by any expert testimony,' the defendant is entitled to judgment, as a matter of law. . . ." *Sostre* at *12-*13 (*quoting Burkhart*). Although that statement of the law is not incorrect, it was wrongly derived from *Burkhart*, where the plaintiffs' allegations *were* supported by expert medical testimony. Courts cannot render decisions based upon hypothetical fact patterns, but only upon the true facts of real cases. *See Playtex Family Prod. v. St. Paul Surplus*, 564 A.2d 681, 688 (Del. 1989)(court cannot rule on hypothetical factual scenario). *Cf. Wheeler v. Barrera*, 417 U.S. 402, 426-27 (1974)("A federal court does not sit to render a decision on hypothetical facts"). To allow *Burkhart* to stand will prevent cases, deserving of trial, from being properly decided on their merits.

Conclusion

Dr. Haines' testimony satisfied the Delaware statutory requirement of expert medical testimony. The Delaware Supreme Court failed to consider that evidence, ignoring the existence of a genuine issue of

material fact, namely whether Respondents treated Petitioner according to the applicable standard of care. Delaware law requires that issue to be decided at trial. The Delaware Supreme Court denied Petitioners their fundamental right to trial.

Because they were denied due process rights, Petitioners ask that this Honorable Court grant their Petition for Certiorari and consider the merits of Petitioners' argument. In the alternative, Petitioners request this Court to grant their petition, vacate the Delaware Supreme Court's order and remand the case for trial on the merits.

Appendices[1]

[1]Numbers in brackets indicate page numbers in original documents.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY J. BURKHART and CARMELLA L. BURKHART, his wife,	§	
	§	No. 58, 1991
Plaintiffs Below, Appellants,	§	Court Below--
	§	Superior Court
v.	§	of the State of
	§	Delaware, in and
ALLEN L. DAVIES, M.D., JOHN T. Oglesby, M.D., and MEDICAL CENTER OF DELAWARE, INC., a hospital corporation of the State of Delaware,	§	for New Castle
	§	County C.A. No.
	§	86C-FE-124
	§	
	§	
	§	
	§	
	§	
	§	
Defendants Below Appellees.	§	

Submitted: November 12, 1991
Decided: December 20, 1991

Before **CHRISTIE, Chief Justice, WALSH and HOLLAND,** Justices.

Upon appeal from the Superior Court.
AFFIRMED.

Darryl K. Fountain, Esquire, Wilmington, Delaware, and Jonathan A. Van Loan, Esquire, Malvern, Pennsylvania for appellants.

David H. Burt, Esquire, of Burt & Burt, Wilmington, Delaware, for appellee, Allen L. Davies, M.D.

F. Alton Tybout, Esquire, of Tybout, Redfearn & Pell, Wilmington, Delaware, for appellee, John T. Oglesby, M.D.

Joanne B. Wills, Esquire, and Eileen Kelly, Esquire, of Morris, James, Hitchens & Williams, Wilmington, Delaware, for appellee, The Medical Center of Delaware, Inc.

HOLLAND, Justice:

[2]On February 26, 1986, the plaintiffs-appellants, Anthony J. Burkhart and his wife, Carmella L. Burkhart

(the "Burkharts"), filed a civil complaint in the Superior Court against the defendants-appellees, Allen L. Davies, M.D., John T. Oglesby, M.D., and the Medical Center of Delaware, Inc. ("Medical Center"). The complaint alleged that the defendants were negligent in the medical care rendered to Mr. Burkhart.

A trial in this matter was scheduled to begin on January 22, 1991. On January 17, 1991, the Superior Court granted motions for summary judgment in favor of all of the defendants. Those rulings were based upon the Burkharts' acknowledged inability to provide expert medical testimony to support their allegations that any of the defendants deviated from the applicable standard of care.

The Burkhart's have raised three interrelated issues in this appeal. Their first contention is that, notwithstanding the absence of any expert testimony to support the allegations in the complaint, there was a material dispute of fact in this medical malpractice action. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Their second contention is that the defendants were required to support each motion for summary judgment with a medical expert's affidavit. Hurtt v. Goleburn, Del. Supr., 330 A.2d 134 (1974). Their third contention is that no action on the motion for summary judgment should have been taken in the absence of ten days notice. Super. Ct. Civ. R. 56(c).

We have carefully reviewed the record. We have concluded that, under the circumstances of this case, the Superior Court's [3]rulings were entirely correct. See Wahle v. Medical Center of Delaware. Inc., Del. Supr., 559 A.2d 1228 (1989). Therefore, its judgments in favor of each defendant are affirmed.

Facts

A jury trial in this matter was originally scheduled to begin on October 23, 1989. However, on June 18, 1989, the Burkharts' attorney of record, C. Wagaman Berl, Jr., died. On August 7, 1989, the case was removed from the trial calendar. On November 7, 1989, Louis P. Agostini, Jr. ("Burkharts' trial attorney") entered his appearance for the Burkharts. A new trial was scheduled to begin on January 22, 1991.

In early January, 1991, the Burkharts notified the defendants that they would present the testimony of just one medical expert, William F. Haines, M.D. ("Dr. Haines"), in support of the allegations of negligence in their complaint against each of the defendants. Dr. Haines' deposition was taken by the defendants on January 11, 1991.

The record reflects that following Dr. Haines' deposition, the Burkharts' trial attorney was "shocked" at Dr. Haines' testimony, and realized that the Burkharts did not have a medical expert prepared to testify that there was a deviation from the standard of care by any

of the defendants. Following Dr. Haines' deposition, Burkharts' trial attorney advised all the defendants' attorneys that he would discuss the merits of a voluntary dismissal of the complaint with the Burkharts. Burkharts' trial attorney subsequently informed the defendants' attorneys that his clients refused [4]to give him authority to voluntarily dismiss the case.

On January 17, 1991, the Superior Court held a conference atthe request of the defendants' trial attorneys. The Burkharts' trial attorney and Mr. Burkhart were present at that conference. The defendants' attorneys of record advised the Superior Court about their assessment of Dr. Haines' deposition. The defendants' attorneys then each moved for summary judgment. The Burkharts'trial attorney responded to those motions, in part, as follows:

> MR. AGOSTINI: A little bit of history on this case. This was initially Mr. Berl's case and I took it over for Mr. Berl --from Mr. Berl after his death. Mr. Burkhart came to my office.
>
> Doctor Haines was listed as an expert witness in this case and I spoke to Doctor Haines on, I believe, three occasions concerning this case, and asked him about

the theory that he had concerning the Burkhart case and whether he believes it was malpractice committed and whether there was any violation of the standard of care. He had indicated he did, and we talked at great length on three occasions for a period from anywhere from a half hour to forty-five minutes.
I was shocked at the deposition -- at Doctor Haines' deposition last Friday not only by his testimony, which appeared that he had no clue as to what was going on, but also by his demeanor....

...

It is true to state with Doctor Haines being the only medical witness expert, the plaintiff does not have a medical expert who can testify that there was a deviation from the standard of care that's required by the statute.

THE COURT: As to any of the defendants?
MR. AGOSTINI: As to any of the defendants. I wrestled with the events of

Friday over last weekend and contacted my clients on Monday and immediately wanted to speak to him [Mr. Burkhart] concerning this issue because I saw many potential dangers to Mr. Burkhart to go forward without having such expert testimony, including sanctions from the Court. I discussed these issues with Mr. [5]Burkhart and I -- and we spent approximately four hours in my office on Monday discussing all the requirements and, you know, chapter sixty-eight. And Mr. Burkhart understood what the legal requirements are, but as a layman he did not believe this was a very fair result in his case....

...

...I have to agree with the defendant -- defendants, because it is uncontradicted there isn't the required testimony. Mr. Burkhart knows that and I've explained that to him.

...And if trial is held on Tuesday, there'll not be a medical expert witness capable

of meeting the standard that's required.

THE COURT: Okay, thank you.

Mr. Burkhart, I know Mr. Agostini has ... explained the law to you and I'm sure you must know that the ... Health Care Malpractice Act provides, and I'll quote it for you, "No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care." And that's a law enacted by the Legislature which applies to this case. And there is nothing that I can do about it or your attorneys can do about it or anybody else can do about it, except apply it.

And you have a case where you're claiming that -- medical practice [sic] and there's no expert witness who is prepared to support that allegation. And as a consequence, the motion will have to be granted.

...

...The motions for summary judgment are granted.

Summary Judgment
Standard of Review

The appellate standard of review, following the grant of a motion for summary judgment, requires this Court to examine the record to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute and that the [6]moving party is entitled to judgment as a matter of law. Benae v. Davis, Del. Supr., 553 A.2d 1180, 1182 (1989). In construing the summary judgment provis ions of the Federal Rules of Civil procedure, the United States Supreme Court has observed:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential

> element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)...." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

Celotex Corp. v. Catrett, 477 U.S. at 322-23.

The Superior Court's Civil Rules are patterned upon the Federal Rules of Civil Procedure. Hoffman v. Cohen, Del. Supr., 538 A.2d 1096, 1097 (1988). The ratio decidendi of Celotex is persuasive and directly applicable to the circumstances of this case.

Delaware Medical Malpractice Statute and Plaintiffs' Complete Failure of Proof

The Delaware Medical Malpractice Act requires

that, in the absence of several exceptions[1] which are not applicable to this [7]case, a plaintiff's claim for medical malpractice must be supported by expert medical testimony. 18 Del. C. § 6853 provides in pertinent part:

> No liability shall be based upon asserted negligence unless expert medical testimony

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[1]The exceptions recognized by the Act are not applicable in the Burkharts' case. The Act provides that:

> [S]uch expert medical testimony shall not be required if a malpractice review panel has found negligence to have occurred and to have caused the alleged personal injury or death and the opinion of such panel is admitted into evidence; provided, however, that a rebuttable inference that personal injury or death was caused by negligence shall arise where evidence is presented that the personal injury or death occurred in any 1 or more of the following circumstances: (l) A foreign object was unintentionally left within the body of the patient following surgery; (2) an explosion or fire originating in a substance used in treatment occurred in the course of treatment; or (3) a surgical procedure was performed on the wrong patient or the wrong organ, limb or part of the patient's body. Except as otherwise provided herein, there shall be no inference or presumption of negligence on the part of a health care provider.

18 Del. C. 6853. See also Russell v. Kanaga, Del. Supr., 571 A.2d 724, 732 n.15 (1990).

> is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death, except. . . .

18 Del. C. § 6853. Consequently, the Delaware statute specifically mandates that, before liability can be found in a medical malpractice action, the plaintiff bears the initial burden of presenting expert medical testimony as to both the alleged deviation from the applicable standard of care and the causal connection between the wrongful conduct and the alleged injury. Russell v. Kanaga, Del. Supr., 571 A.2d 724, 732 (1990).

As a result of the statutory mandate, the production of expert [8]medical testimony is an essential element of a plaintiff's medical malpractice case and, as such, is an element on which he or she bears the burden of proof. Id. The record reflects that, within a few days of trial, the Burkharts had no medical expert who would testify in support of the allegations of negligence in their complaint. Consequently, the Superior Court granted the defendants' motions for summary judgment, on the basis that because the Burkharts, as the plaintiffs, had failed to adduce any expert medical testimony, there was a complete failure of proof concerning an essential element of their case, and all other facts were rendered

immaterial. See Celotex Corp. v. Catrett, 477 U.S. at 323. Accord Wahle v. Medical Center of Delaware. Inc., Del. Supr., 559 A.2d 1228, 1233 (1989).

Summary Judgment Proper
Without Defense Expert

The Burkharts argue that, notwithstanding their own inability to present any expert testimony to support the allegations of medical negligence in their complaint, the Superior Court erred in granting the defendants' motions for summary judgment in the absence of any affidavits by medical experts to support those motions. We disagree. A motion for summary judgment may be filed with or without supporting affidavits. Super. Ct. civ. R. 56. Under certain circumstances, in a medical malpractice action, a defendant-health care provider's motion for summary judgment must be supported by an expert's affidavit. See, e.q., Ogden v. Gallagher, Del. Supr., 591 A.2d 215, 222 (1991); Baylis v.Wilmington Medical Center, Inc., Del. Supr., 477 A.2d 1051, 1057 [9](1984); Hurtt v. Goleburn, Del. Supr., 330 A.2d 134, 135 (1974). However, the record in this case does not reflect one of those circumstances. See Wahle v. Medical Center of Delaware. Inc., 559 A.2d at 1233.

In Celotex, it was observed that when, after an adequate time for discovery, the nonmoving party has failed to make a sufficient showing on an essential element of its case, the standard for granting a motion

for summary judgment mirrors the standard for a directed verdict. See Celotex Corp. v. Catrett, 477 U.S. at 323. This Court has held that, in the absence of an applicable exception or medical testimony to support the plaintiff's allegations, the defendant was entitled to a directed verdict. Russell v. Kanaga, 571 A.2d at 732. If a directed verdict is granted, a fortiori, the defendant is not required to present any expert medical testimony.

Similarly, the moving party is entitled to summary judgment, as a matter of law, if the nonmoving party fails to make a sufficient showing on an essential element of his or her case with respect to which he or she has the burden of proof. Celotex Corp. v. Catrett, 477 U.S. at 323. Therefore, when the nonmoving party bears the ultimate burden of proof, summary judgment is proper if the moving party can show a failure of proof concerning an element that is essential to the nonmoving party's case. Id. Consequently, we hold that, in the absence of an applicable statutory exception, when there has been an adequate time for discovery in a medical malpractice action and the record unambiguously reflects that the plaintiff's allegations are not and will not be supported [10]by any expert medical testimony, a defense motion for summary judgment does not require the support of an expert's affidavit. Wahle v. Medical Center of Delaware. Inc., 559 A.2d at 1233-34.

Summary Judgment Proper

Without Ten Days Notice

The Burkharts' final contention is that the Superior Court erred in granting the defendants' motion for summary judgment on less than ten days' notice. Super. Ct. Civ. R. 56(c). However, as this Court noted in Wahle, Superior Court Civil Rule 56(bb) authorizes the Superior Court "to invoke Rule 56 on less than ten days' notice." Wahle v. Medical Center of Delaware. Inc., 559 A.2d at 1234. That rule provides, in part:

> The limitation of time for the filing of motions for summary judgment in accordance with Rule 56(a) and Rule 56(b) shall not prohibit the filing of a motion for summary judgment by any party when, as a result of a pretrial conference, in the opinion of the court, the filing of such a motion is desirable....

Super. Ct. Civ. R. 56(bb).

The circumstances of the case presently before this Court resemble the circumstances in Wahle v. Medical Center of Delaware. Inc., Del. Supr., 559 A.2d 1228 (1989). In Wahle, following a pretrial conference the Superior Court ruled that the plaintiff would be precluded from introducing expert medical testimony at trial. Id. at 1232. As this Court noted, the Superior Court's ruling "effectively ended the case by rendering a trial meaningless." Id. The defendants moved for

summary judgment, and the Superior Court granted that motion. Id.

In Wahle, when affirming the Superior Court's decision, this [11]Court recognized that, as a result of the express requirements of Section 6853, expert testimony was critical to proof of the plaintiff's medical malpractice claim. Id. at 1233. In Wahle, this Court also noted that when it is undisputed prior to trial that no medical expert will be testifying in support of the plaintiff's claim, dismissal of the plaintiff's suit is inevitable. Id. at 1234. Therefore, this Court held that, "[i]n view of the critical nature of the medical evidence to all parties," the Superior Court was justified in entering summary judgment in favor of the defendants on less than ten days' notice. Id. at 1233.

Like the plaintiff in Wahle, the Burkharts' undisputed lack of medical expert testimony, an essential element of their case, necessarily rendered a trial meaningless. See id. at 1232. See also Celotex v. Catrett, 477 U.S. at 323. Consequently, following the pretrial conference, the record reflected that the defendants were entitled to judgment as a matter of law. Thus, under the circumstances of this case, the Superior Court properly granted summary judgment in favor of the defendants, albeit with less than ten days' notice to the Burkharts. Super. Ct. Civ. R. 56(bb).

Conclusion

The judgments of the Superior Court, in favor of each of the defendants, are AFFIRMED.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ANTHONY J. BURKHART, et al,	)	
Plaintiffs,	)	
vs.	)	86C-FE-124
ALLEN L. DAVIES, M.D., et al.	)	Argument on Motion January 17, 1991
Defendant,	)	

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BEFORE: HON. JOHN E. BABIARZ, J.

- - - - -

APPEARANCES:

LOUIS AGOSTINI
Attorney at Law
On behalf of plaintiffs.

JOANNE B. WILLS

Attorney at Law
Morris, James, Hitchens & Williams
On behalf of Medical Center of Delaware.

DAVID BURT Attorney at Law
On behalf of Allen L. Davies, M.D.

F. ALTON TYBOUT
Attorney at Law
Tybout, Redfearn & Pell
On behalf of John T. Oglesby, M.D.

DAVID BURT
Attorney at Law
On behalf of

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TRANSCRIPT OF PROCEEDINGS

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OFFICIAL COURT REPORTERS
Superior Court of the State of Delaware
Public Building - Wilmington, Delaware
(302) 571-2390

[2]January 17, 1991
Courtroom No. 204
4:30 o'clock p.m.

PRESENT:

As noted.

THE COURT: Mr. Burt.

This is Burkhart versus Davies' motion for summary judgment.

Mr. Burt.

MR. BURT: Good afternoon.

I thank you for hearing this on short notice. I know all the parties appreciate it.

As Your Honor is aware, this is a medical malpractice case in which Mr. Burkhart, who's present, is represented by Mr. Agostini. Mrs. wills represents the Medical Center and Mr. Tybout represents Doctor Oglesby. I'm here for Doctor Davies.

As I can conceive it, today's hearing has two purposes. One is to -- for the presentation of the scheduled motion for summary judgment and another is for the consideration of -- well, why don't I just start with the motion and grounds therefor.

Doctor Haines' deposition was taken the other day. After a couple of apparently unavoidable delays [3]and developed a deposition that really is not prepared to offer any opinion, as I understand it, that any defendant

violated the applicable standard of care.

It's a statutory requirement, of course, that such testimony be offered on the plaintiff's part in order to even get the case to a jury. And it seems an Iwful waste of resource6 to begin a trial and select a jury, get before the Court, get all our armies lined up, only to discover that that basic requirement can't be met.

I discussed that situation at length with Mr. Agostini on Monday, Doctor Haines' deposition having een taken on Friday, and as I understand it, he -- and he can correct me if I'm wrong, but he and Mr. Burkhart had a long discussion about that in very prompt fashion, after which it was Mr. Agostini's understanding, conveyed to me and confirmed by my letter of which the court has no copy, but I can provide one if one is desired, that the case would be dismissed with respect to all defendants.

There seems to be a problem with that now. So I thought it might be well to bring this matter to the Court's attention now in the form of a motion, [4]and some explication from the Court as to the legal standard to be applied in consideration of the motion might facilitate the dismissal. If there is no dismissal -- or it might be done upon a motion, either way.

I really have nothing further to offer right now.

THE COURT: Okay. Do any of the other defense attorneys wish to speak to--

Mr. Tybout?

MR. TYBOUT: Well, I do and I have my own motion, which I served on the parties. This is the motion -- and my motion is the same thing, and it's based on the same ground. Doctor Haines' deposition was taken, and I do not have a copy of that deposition, but I have the synopsis of it given to me by the attorney from my office who was there.

In effect, Doctor Haines said he had no criticism of Doctor Davies and his standard of care.

His criticism of Doctor Oglesby was that he was negligent in failing to render a diagnosis after his admission to the hospital and failure to supervise a resident.

Well, Doctor Haines, as has occurred before [5]on a number of occasions, was confused. The admission to the hospital was under the care of Doctor Davies, not -- Doctor Oglesby was the radiologist. And Doctor Davies had what supervision there was of a resident.

The end result is that Doctor Haines, more and more as the years go by, is just hopelessly confused.

Like Mr. Burt, I think that it would be an unfortunate waste of everyone's time to assemble on Tuesday to get the jury selected and then find that the plaintiff has no expert testimony to support his claim. Therefore, we also think the most expeditious disposition of the case would be by summary judgment right now on the ground the plaintiff has no expert testimony.

And, of course, we do not oppose Mr. aurt's motion.

THE COURT: Mrs. Wills

MS. WILLS: Your Honor, it was my understanding that the Medical Center was to be dismissed in this case. A release and stipulation of dismissal were sent to the plaintiff's counsel. However, neither have been signed as of today. If they are signed and they are not -- I just heard of this [6]motion for summary judgment today. I was not at Doctor Haines' deposition on the basis that I thought I was out of the case. However, I ask that also the Medical Center be joined in the motion for summary judgment at this time and be dismissed so -- that dismissal is so granted.

THE COURT: Mr. Agostini.

MR. AGOSTINI: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. AGOSTINI: Doctor Haines is -

A little bit of history on this case. This was initially Mr. Berl's case and I took it over for Mr. Berl -- from Mr. Berl after his death. Mr. Burkhart came to my office.

Doctor Haines was listed as an expert witness in this case and I spoke to Doctor Haines on, I believe, three occasions concerning this case, and asked him about the theory that he had concerning the Burkhart case and whether he believes it was malpractice committed and whether there was any violation of the

standard of care. He had indicated he did, and we talked at great length on three occasions for a period from anywhere from a half hour to forty-five minutes.

[7]I was shocked at the deposition -- at Doctor Haines' deposition last Friday not only by his testimony, which appeared that he had no clue as to what as going on, but also by his demeanor. And I think Mr. Burt can -- I don't think that he would disagree with me. There were two outbursts during the deposition. I personally feared for my personal safety and I think Mr. Burt also feared for his. I can't say that, but it was a shocking display I never ever seen happen in a deposition, let alone at the deposition of a medical witness.

I spoke with Jack White, who took the deposition, and he said he had taken over a thousand medical depositions and he had never seen anything like it and he was shocked.

And I consequently was very embarrassed by my expert witness's conduct. And I have never met the man before. I only spoke with him over the telephone. But it was -- it was a joke to be honest.

It is true to state with Doctor Haines being the only medical witness expert, the plaintiff does not have a medical expert who can testify that there was a deviation from the standard of care that's required by [8]the statute.

THE COURT: As to any of the defendants?

MR. AGOSTINI: As to any of the defendants. I wrestled with the events of Friday over last weekend and contacted my clients on Monday and immediately wanted to speak to him concerning this issue because I saw many potential dangers to Mr. Burkhart to go forward without having such expert testimony, including sanctions from the Court. I discussed these issues with Mr. Burkhart and I -- and we spent approximately four hours in my office on Monday discussing all the requirements and, you know, chapter sixty-eight. And Mr. Burkhart understood what the legal requirements are, but as a layman he did not believe this was a very fair result in his case. And when we left that day, he seemed to be agreeable to -- for me to do what had to be done, but I spoke with him the following morning -- and purposefully didn't do anything immediately because I knew Mr. Burkhart was very upset. I didn't want to take I position or sign a motion to -- stipulation for dismissal until I was sure that I had authority from my clients.

I've spoken to Mr. Burkhart again on a couple [9]of occasions since then to discuss that -- discuss this, and Mr. Burkhart does not -- will not give me authority to sign the motion to dismiss. Mr. Burkhart understands that the legal requirement that an expert witness be able to testify about the deviation from the standard of care, but he believes that it is unfair that his case would be

dismissed because of that because he very strongly believes that the defendants in this case have committed a malpractice and that he's suffered tremendous harm as a result thereof.

I explained to Mr. Burkhart that he -- he had indicated, well, there's got to be, you know, some leeway. There's got to be some exceptions. I explained to Mr. Burkhart that the Court has to apply the law and that *if* he believes that the law is unfair, that the appropriate way to address that was in the Legislature and that the Court could not ignore directions from the Legislature as to what is required in medical malpractice cases.

I come before the Court today with -- you know, on the one hand I have to agree with the defendant -- defendants, because it is uncontradicted there isn't the required testimony. Mr. Burkhart knows [10]that and I've explained that to him.

The only remedy to the situation that I could possibly see is that Mr. Burkhart be allowed time to -- limited amount of time to procure an affidavit or report from an expert to justify his belief or to confirm his belief that there's been a malpractice. But if that's not going to be done, I cannot, you know, disagree with the defendants that the plaintiff has not met that requirement. And if trial is held on Tuesday, there'll not be a medical expert witness capable of meeting the standard that's required.

THE COURT: Okay, thank you.

Mr. Burkhart, I know Mr. Agostini has told you that --

You can sit down, sir.

MR. BURKHART: Okay.

THE COURT: We're not that formal.

I know your attorneys have explained the law to you and I'm sure you must know that the medical care -- Health Care Malpractice Act provides, and I'll quote it for you, "No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the [11]applicable standard of care." And that's a law enacted by the Legislature which applies to this case. And there is nothing that I can do about it or your attorneys can do about it or anybody else can do about it, except apply it.

And you have a case where you're claiming that -- medical practice and there's no expert witness who is prepared to support that allegation. And as a consequence, the motion will have to be granted.

In a small sense it's helpful to you because had you went -- had you gone to trial next Tuesday and inevitably lost, you might have been taxed expert witness fees from the other side and you'd have been out of pocket more than you are now.

So I'm going to enter the orders that have been submitted, and I've added the Wilmington Medical

Center to one of them. The motions for summary judgment are granted.

MR. BURT: Your Honor, if I might address a procedural matter of record.

THE COURT: Sure.

MR. BURT: Service was only just completed on the other attorneys and a --the copy of the original [12]will either be handed to Your Honor or filed with Prothonotary as you prefer.

THE COURT: Pardon me?

MR. BURT: The original of the motion is not yet in the file is the problem, but it can either be handed to Your Honor or --

THE COURT: It is now.

MR. BURT: All right, then. Thank you, Your Honor.

THE COURT: Court's now in recess.

(Hearing ended at 4:45.)

[13]CERTIFICATE OF COURT REPORTER

I, Betty J. Gleason Official Court Reporter of the Superior Court, State of Delaware, do hereby certify that that foregoing is an accurate transcript of the proceedings had, as reported by me, in the Superior Court of the State of Delaware, in and for New Castle County, in the case herein stated, as the same remains of record in the office of the Prothonotary at Wilmington, Delaware.

WITNESS my hand this 30th day of January, A.D., 1991.

_____

Betty J. Gleason
Official Court Reporter

IN THE SUPERIOR COURT OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ANTHONY J. BURKHART and CARMELLA L. BURKHART, his wife, Plaintiffs	:	
v.	:	C.A. No. 86C-FE-124
ALLEN L. DAVIES, M.D., JOHN T. OGLESBY, M.D., and MEDICAL CENTER OF DELAWARE, INC., a hospital corporation of the State of Delaware, Defendants.	:	

ORDER

The Court having heard the attorneys for the parties on the Motion of defendant Allen L. Davies, M.D., for Summary Judgment,

IT IS ORDERED that Dr. Davies' Motion for Summary is granted, and all claims, including cross-

claims, against Dr. Davies are dismissed with prejudice and *it is further ordered that all claims against the Medical Center of Delaware, Inc. are dismissed with prejudice.*[1]

[s]_____
J.

SO ORDERED this *17th*

day of *January*, 1991.

File '91 JAN 17 P4:459
PROTHONOTARY

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[1]Italicized words are those handwritten by judge.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ANTHONY J. BURKHART and CARMELLA L. BURKHART, his wife,	)	
Plaintiffs,	)	
v.	)	C.A.No.86C-FE-124
ALLEN L. DAVIES, M.D., JOHN T. OGLESBY, M.D., and MEDICAL CENTER OF DELAWARE, INC., a hospital corporation of the State of Delaware,	)	
Defendants.	)	

Deposition of WILLIAM F. HAINES, M.D., taken before Jack P. White, Registered Professional Reporter, at 404 McFarland Road, Kennett Square, Pennsylvania,

on Friday, January 11, 1991, beginning at 12:34 p.m., there being present:

LOUIS P. AGOSTINI, JR., ESQ.
Agostini, Levitsky & Agostini
for the Plaintiffs.

DAVID H. BURT, ESQ.
Warren B. Burt & Associates for the Defendant Davies.

NANCY E. CHRISSINGER, ESQ.
Tybout, Redfearn & Pell for the Defendant Oglesby.

Chancery Court Reporter
135 Public Building
Wilmington, Delaware 19801
(302) 577-2447

[2]having been duly sworn, was examined and deposed as follows:

- - -

BY MR. BURT:

Q. Dr. Haines, it's my understanding that you are prepared to testify as the plaintiffs' expert witness in this case. Is that right?

A. That's right.

Q. Has your testimony been scheduled for trial?

A. No. I know of no trial date.

Q. With whom have you discussed this case?

A. With the plaintiff and with Mr. Agostini.

Q. When did you discuss it with Mr. Agostini?

A. I'm giving you an estimate: It may be two or three weeks ago. It was prior to the scheduled deposition which was canceled. About a week or two before that.

Q. Was that over the telephone?

A. Yes.

Q. Was that your only contact with Mr. Agostini?

A. I think we had two conversations. I have not met him in his office.

[3]Q. What was the substance of those conversations?

A. That Mr. Agostini had taken the case of the plaintiff and he wished me to review chart materials that

he had, and the carrier brought that up and left it here. I reviewed it and then -- that was our second conversation.

Then we talked about that over the phone and scheduled or talked about when and where we would take the deposition.

Q. Do you still have the materials that were brought up?

A. Not here. Not with me.

Q. Where are they?

A. They are either in my home or in the car.

Q. The notice of deposition requests that the deponent have available essentially -- I'm paraphrasing -- everything that has been reviewed in connection with the anticipated testimony. If it is in your car, I'd ask that you produce it so that I can have a look at it. Maybe that can be done at the same time that you see this patient.

A. Mr. Burt, the car is full of material. If I can't find it easily, it could easily take me an hour to [4]look through all the material in the car.

MR. BURT: What do you want to do?

MR. AGOSTINI: I can tell you that the materials that I sent to him are exactly the same materials that I furnished in my most recent supplemental request for production. As a matter of fact, it is identical.

MR. BURT: It's of some importance that I see what he saw, I think. So we'd ask that that be made to

happen.

THE WITNESS: I was unaware of this request.

MR. BURT: How would you like to proceed? I'd like to see it today. MR. AGOSTINI: If you have the records --I don't have my entire file. I don't have my supplemental production that I provided I believe it was about three weeks ago. If anyone has that with them, that would be the exact same documents, the exact same sequence that he has.

MR. BURT: I'd also like to see what he has seen. Sometimes there are notations and there is probably other stuff in the file that came from Mr. Berl, and we need to know what he has seen

MR. AGOSTINI: I believe the only thing he [5]has reviewed is what I provided to him, and again there was production. I made I think six copies. Each attorney got a copy and Dr. Haines got a copy.

BY MR. BURT:

Q. Dr. Haines, is that correct? The only materials you've reviewed are those sent to you by Mr. Agostini?

A. Recently. When the case was handled by Mr. Berl I reviewed the material he had, and as he was terminating his practice he asked me to bring all the material I had to his office so that, of course, he could transfer that to whatever attorneys the plaintiffs wished to proceed with. So that should have been in his office, and I would suppose it must go to Mr. Agostini or

whoever he went to prior to Mr. Agostini.

But the only things I have reviewed recently are what Mr. Agostini sent me, and whatever Mr. Berl -- whatever I reviewed with Mr. Berl, I've long forgotten that.

I do remember the section where he went to Johns Hopkins. I remember that Mr. Berl had and I remember seeing that.

The preliminary material is actually fairly brief. Mr. Agostini is certainly correct: Whatever he [6]had and whatever all of you have is all that I have seen.

Q. I would like to see whatever you've seen, and would ask that you look for it in your car in the break.

A. All right.

Q. Have you produced a report?

A. No.

Q. Did you ever produce one for Mr. Berl?

A. I don't believe so, no.

Q. Do you have a current copy of your CV handy?

A. No.

MR. BURT: I might ask for that on followup. I'm not sure I asked for that before.

BY MR. BURT:

Q. I take it that at some point you discussed the substance of the case with Mr. Berl. Is that right?

A. Yes.

Q. Have you ever examined the plaintiff, Anthony

Burkhart?

A. Yes.

Q. When did you last do that?

A. When he came to Mr. Berl and Mr. Berl set up an appointment for me to do that.

Q. How long ago was that?

[7]A. Mr. Burt, I do not know.

Q. Do you expect to testify about that at trial? A. What? Q. When you examined him and what you found.

I just told you: When he came in the office, Mr. Berl set up an appointment and that's when I examined him. I made no notes of when I examined him.

Q. I see. Did you make any notes of the examination itself?

A. No.

Q. So that anything you presently know from that examination is a matter of your own memory and not something you recorded at the time?

A. That's correct.

Q. And you are also unable to say when you examined him, just so we are clear on that; is that right?

A. That's correct.

Q. Where did you examine him?

A. In Mr. Berl's office.

Q. Did you examine him only the one time?

A. Yes.

Q. Do you recall what that examination consisted of?
[8]A. It focused on the complaint that Mr. Burkhart had at that time, which was an abdominal complaint.
Q. Do you have any plan -- have any arrangements been made for you to examine Mr. Burkhart at some time in the future?
A. No.
Q. During your examination of Mr. Burkhart did you take a history?
A. A brief one. I did not take a history in the sense of a complete history at all. Mr. Burkhart described to me his problem, and I responded to that. So that there was no completeness in the sense of eliciting a family history, a social history, a particularly complete history of past medical illnesses, and so on.
Q. Does it follow that you didn't discuss in any detail with Mr. Burkhart the substance of any exchange he had with Dr. Davies?
A. No.
Q. You say you focused on his abdominal complaint. What did he tell you about that?
A. That one side seemed numb to him and either a little bit larger of more shallow as compared [9]to the other side.
Q. Larger or more shallow?
A. Yes.
Q. Are those the same thing, being larger or more

shallow? I'm sorry. I just don't understand, I suppose, what the term "more shallow" means.

A. I'm talking about the contours of his abdomen. In comparison to one side that he thought was normal, the opposite side was either indented or more shallow or bulged a little bit and was larger.

Q. And you don't recall which it was?

A. No.

And also more numb.

Q. Is it possible that he reported to you that the side that was different, was not normal in his view, was more sensitive?

A. I can't remember whether he thought it was more sensitive or more numb. There was a difference in sensation.

Q. Where do you presently live?

A. 702 Monument Road, Malvern, Pennsylvania, 19355.

Q. Where do you practice medicine?

A. Same place. Also here.

[10]Q. I noticed on the way in that your name is not on the door here. What is the arrangement by which you practice here?

A. Group practice.

Q. What is the -- you say "group practice." Do you take overflow patients from this practice? Can I just know what your referral base is for this practice?

A. I was invited to join this group practice. I see patients here. What the arrangements are, I don't know. I don't know how the secretaries assign the patients to me or to anybody else.

Q. Do you have an arrangement by which the plaintiff will pay you in exchange for the time that you are devoting to the testimony in this case?

A. No.

Q. What do you charge for testimony time?

A. I don't understand the question.

Q. For a deposition such as this, do you have an hourly rate?

A. No.

Q. Is it your practice, then, not to charge for deposition time?

A. I have no practice in connection with a legal practice. I have no rituals, no prior decisions [11]as to what I am going to do or not. It is a case-by-case method, to put it in your legal terminology.

Q. Your deposition has been taken before; is that correct?

A. That's right.

Q. Has your deposition been taken, say, upwards of 100 times in medical malpractice cases?

A. I don't know.

Q. Upwards of eighty times?

A. I don't know.

Q. Fifty?

A. I did not count them. I do not know.

Q. Would you be able to say whether it's been taken more than fifty times?

A. No.

Q. Is it possible?

A. It's possible.

Q. Is it also possible it's been taken more than 75 times?

A. It's possible.

Q. Is it possible it's been taken more than 100 times in medical malpractice cases?

A. It's possible.

Q. When your deposition has been taken in [12]medical malpractice cases have you charged a fee for that service?

A. If you mean have I sent a bill for the services, the answer is no.

Q. Have you otherwise charged a fee besides sending a bill?

A. No.

Q. May I conclude that you do not intend to make any charge for today's deposition?

A. Where do the charges go to?

Q. I suppose that would be between counsel. I just would like to know what your charge is for taking a deposition such as this.

A. I will tell you this, Mr. Burt: If I go out and search in that car in this weather and I get sick, there's going to be a lot of charges to you directly.

Q. What do you mean?

A. I mean that your requirement for this deposition is for me to go out in that car, and if I get sick over it you are going to hear about it, and so is the Delaware Bar.

Q. Okay.

Dr. Haines, you've testified in court in medical malpractice cases before, haven't you?

[13]A. What?

Q. Testified in court before.

A. That's right.

Q. What is your charge for testifying in court?

A. I don't have a charge.

Q. No charge.

A. No charge.

Q. Let me say for the record that my understanding at this point is that there is no charge for this deposition.

A. Mr. Burt, that depends on what happens.

Q. All right. Can you explain that?

A. I just did.

Q. I'm sorry. I don't understand.

A. I told you if I have to go out in that car and get sick, there's going to be plenty of charges. Can't you hear.

Q. Oh. I guess I didn't understand that, Dr. Haines. Are you presently acting as a consultant in other Delaware medical malpractice cases?

A. No.

Q. This is your only case in Delaware?

A. Right.

[14]Q. Are you a thoracic surgeon?

A. No.

Q. Have you ever done surgery?

A. Yes.

Q. What sort of surgery have you done?

A. Minor surgery.

Q. Have you ever done thoracic surgery?

A. No.

Q. When was the last time you did minor surgery?

A. I can't remember.

Q. Was it more than twenty years ago?

A. No. Well, I have done it twenty years ago, yes. More than twenty years ago. Yes. But that's not the last time.

Q. I just don't understand. You are saying you have done minor surgery within the last twenty years?

A. That's right.

Q. What sort of procedures are you talking about?

A. Removal of minor lesions, moles, warts. I think about three months ago I sutured a laceration.

Q. Things of that nature are the sort of surgery that

you have performed?

[15]A. Right.

Q. Have you ever resected an organ?

A. No.

Q. Have you ever resected a bone?

A. No.

Q. If you had a patient who required surgery of the chest, would you refer that patient to a thoracic surgeon?

A. I don't know.

Q. What would you need to know?

A. I don't understand that question: What would I need to know. Can you define it?

Q. I'm sorry. Define what?

A. The content of your question: What would I need to know. Tell me what I needed to know.

Q. Let's take a hypothetical case.

A. Good.

Q. Say you had a patient who had thoracic outlet syndrome or you believed had thoracic outlet syndrome.

A. Right.

Q. Would it be reasonable for you to refer that patient to a thoracic surgeon for further evaluation?

A. Sure.

[16]Q. Would you then expect the thoracic surgeon to make recommendations about treatment?

A. Sure.

Q. Can you name a surgical treatment for thoracic

outlet syndrome?

A. Resection of the obstructing tissue that interferes with arterial flow.

Now are we going to define what I needed to know with the hypothetical?

Q. Well, why don't we stick --

A. Aren't you going to follow up your questions?

Q. Why don't we stick with the present program.

A. All right.

Q. You just referred to an operation in which tissue is resected to alleviate its impingement on the arterial flow, or words to that effect.

A. Yes.

Q. What tissue is resected in that operation?

A. Muscle, tendon, perhaps bone.

Q. On the subject of thoracic outlet syndrome, can you name some well-known medical authors?

A. No.

Q. With respect to surgery of the chest, [17]is there a standard textbook to which you would refer?

A. Surgery of the chest?

Q. Yes.

A. No. I can't remember the textbooks that I would refer to, no.

Q. Returning for a moment to your consultations with Mr. Berl. Am I correct that you gave him an opinion on the case by telephone at some point?

A. A rough opinion, yes.

Q. Has your opinion as to whether or not Dr. Davies has conformed to the standard of care in this case changed between the time you talked with Mr. Berl and today?

A. No.

Q. Do you have such an opinion?

A. No.

Q. You have no opinion as to whether Dr. Davies has conformed to the standard of care. Am I correct?

A. Right.

Q. It follows, then, that you are not prepared to testify that Dr. Davies deviated from the standard of care applicable to him in any respect; is that correct?

MR. BURT: Let the record reflect there was no answer to the question, and that Dr. Haines was required to [18]leave the room to attend to a patient and will return.

(Brief recess taken.)

THE WITNESS: Dr. Haines has formally requested Mr. Louis Agostini to put in some formal legal writing the request or command by Mr. David Burt prior in this deposition proceedings that I, Dr. Haines, on a wintry Friday afternoon, January 10th, during which such deposition was being taken Mr. David Burt had access to a window in the offices that I occupy in Kennett Square, was able to see the conditions outside the window of

snow on the ground; ignored the possibility of injury to Dr. Haines by slippage on ice, danger to his physical condition in searching for material that Mr. David Burt wished to see during such deposition.

Mr. Agostini has agreed to relate these findings in formal legal language so that he and I can discuss the advisability of informing the legal authorities in the State of Delaware.

(Discussion off the record.)

MR. BURT: Why don't we pick up where we left off. I'll ask Mr. White to please read back the last two or three questions and answers.

(The Court Reporter read back as follows:

"Question: Has your opinion as to whether [19]or not Dr. Davies has conformed to the standard of care in this case changed between the time you talked with Mr. Berl and today?

"Answer: No.

"Question: Do you have such an opinion?

"Answer: No.

"Question: You have no opinion as to whether Dr. Davies has conformed to the standard of care. Am I correct?

"Answer: Right.

"Question: It follows, then, that you are not prepared to testify that Dr. Davies deviated from the standard of care applicable to him in any respect; is that

correct?")

THE WITNESS: That's the question without the answer?

THE REPORTER: Yes, sir.

THE WITNESS: The answer is that -- the answer is no at the present time. If there were further materials to demonstrate the surgical approach and opinions of Dr. Davies, then that, of course, might change the opinion or produce an opinion.

BY MR. BURT:

Q. I asked you a question that could be [20]answered either yes or not, and it might mean a couple of different things. Just to be sure that I understand your answer: Today, based on the information that you have seen to date, you are not prepared to offer an opinion that Dr. Davies deviated from the standard of care. Am I correct?

A. Correct.

MR. BURT: I have no further questions.

BY MS. CHRISSINGER:

Q. Dr. Haines, I have just a few questions for you. My name is Nancy Chrissinger, and I represent Dr. Oglesby in this case.

Doctor, have you ever performed an arteriogram?

A. No.

Q. Have you ever reviewed any literature regarding the appropriate manner in which an arteriogram is to be

performed?

[21]A. Could you define what you mean by "appropriate"?

Q. Let me rephrase the question.

Have you ever reviewed any material regarding the methods by which an arteriogram is to be performed?

A. I still am fuzzy as to what you mean by how it is to be performed. You mean a standard of care or do you mean performance of it? Do you mean the experience of having reviewed literature which talks about it?

Q. Let's start with that one. Have you reviewed any literature, either in connection with this case or otherwise, about arteriograms in general?

A. Yes.

Q. What literature is that?

A. The literature from the case reports. There is --

Q. I'm sorry, Doctor. When you say "case reports," are you referring to this particular case?

A. No. Other case reports where arteriograms have been done in the State of Delaware. They were from Mr. Berl's files.

Q. And you reviewed that at the time you gave Mr. Berl your -- I think you called it a rough opinion over the telephone?

A. I reviewed the plaintiff's case. If we are talking about the plaintiff's case. What I am trying to get across

to you is that during my association with Mr. Berl there were other cases in which arteriograms were performed and I gained a knowledge as to how they [22]were done in the State of Delaware.

Q. Did you gain that knowledge through literature as in published literature or through medical records of other medical malpractice plaintiffs?

A. Other cases. Other medical malpractice cases, yes.

Q. And those cases, as I understand it, were primarily, if not exclusively, medical malpractice plaintiffs' cases?

A. They were cases of plaintiffs who came in the office. I don't think I would go so far as to define them as malpractice cases. They were cases I reviewed. I'm not the legal expert to make that decision.

Q. In terms of published studies or published materials in medical journals, have you reviewed materials regarding arteriograms?

A. I can't answer that question. I don't know.

Q. Have you ever referred a patient of yours for an arteriogram?

A. I don't know that.

Q. I take it, then, that it follows that you can't tell me whether you ever referred a patient of yours to a Delaware physician for the purpose of having an arteriogram performed?

[23]A. No. I can tell you that I have not referred any

patient to a Delaware physician for an arteriogram.

Q. There's been some discussion about the materials that you have reviewed in connection with this lawsuit. You indicated you reviewed some materials from Mr. Berl and then you returned those materials to Mr. Berl; is that correct?

A. Yes.

Q. You told us that Mr. Agostini provided you with some materials and that those materials are either in your home or out in your car.

A. Yes.

Q. I take it those materials are in a file of some sort? A folder.

A. Yes.

Q. Is there anything in that folder, wherever it may be, other than the materials that Mr. Agostini sent to you?

A. Could you ask me that once again, please?

Q. Sure. If you can try to picture the file, if you can, is there anything in there other than what Mr. Agostini sent you?

A. No.

Q. You don't have any handwritten notes on [24]this?

A. No.

Q. And you don't have, I think -- I think you told us that you don't have office notes from your examination

of Mr. Burkhart at the time he was represented by Mr. Berl.

A. That's correct.

Q. At the time you gave your rough opinion over the phone to Mr. Berl about this case, did you have an opinion with respect to the conduct of Dr. Oglesby in this case?

A. When I discussed it with Mr. Berl?

Q. Yes.

A. In trying to be very fair with you, you are talking about events that now are some time in the past. So that the details are not vivid in my mind, certainly. The best I can tell you is that I had some comments and also questions in connection with Dr. Oglesby, but that is blurred now because as I have reviewed the chart from Mr. Agostini, I have the same things. That is, comments and questions. And I can't really separate the two from the impressions I had at the time when I worked with Mr. Berl from the impressions I have gotten recently. And it becomes very difficult and hazardous for me to [25]again tell you in a very clear way which would be which now. I can tell you that certainly I discussed the case with Mr. Berl and had opinions which were verbal at that time, yes.

Q. And any opinion you have with respect to Dr. Oglesby's conduct in this case remained verbal?

A. Yes.

Q. What opinions or comments do you have with respect to the conduct of Dr. Oglesby in this case?

A. There are both. As I tell you these things, try to consider them as both a comment and a question. For example, one question is -- and please correct me if I deviate from the knowledge that you have from reviewing the chart materials. You have, haven't you?

Q. Not completely thoroughly.

A. My memory is that Dr. Oglesby hospitalized Mr. Burkhart in the hospital -- I think that was the Wilmington Medical Center, but I'm not certain -- after he fainted in his bathroom, and that Mr. Burkhart was admitted under the service of Dr. Oglesby. So that the question I have is: Is this common in the State of Delaware? And my assumption is, Dr. Oglesby had admitting privileges in the hospital. That seems unusual to me that a radiologist hospitalizes patients under his care.

[26]We have -- or at least I had no recollection of any nurses' notes, for example, in the materials I had. They were sparse. I think there was a discharge summary written by a resident, and again I should like to know the connection between the resident and Dr. Oglesby. Is a resident assigned to his service? Was the resident a radiological resident, an internal medicine resident or what have you? Again, from the records that I reviewed, I see nothing to indicate Dr. Oglesby visited Mr.

Burkhart whatsoever.

Q. And this is -- you are talking about the subsequent hospitalization following the fainting spell?

A. There was only one hospitalization that I know of when Mr. Burkhart actually was admitted to the hospital. There was a procedure done, which was the arteriogram, and I'm assuming that that was an outpatient procedure; that that was not actually an admission, but he was brought into the X-ray or radiological department of the hospital where the procedure was done and then he went home. So we are talking about the admission itself.

The question I have, again, which may be supplied by materials that I don't have, is the initial history and physical examination, progress notes, which I'm not aware of -- and again, I'm not saying they aren't [27]there -- and the questions concerning the administrative network of the hospital itself as to how Dr. Oglesby has admitting privileges, and so on, and what protocol there is for a physician other than Dr. Oglesby to manage undertake management of the patient under his apparent servlce .

Q. I'm sorry. To what physician are you referring? To the surgical resident?

A. Yes. I had forgotten that the resident was a surgical resident. All right. So the questions are: How did he arrive on the scene? How is he associated with Dr. Oglesby? What communications were transmitted

between he and Dr. Oglesby? Does Dr. Oglesby choose the kind of resident that came in? In other words, what responsibility does Dr. Oglesby have for a patient admitted under his service?

Q. You indicated that there are questions that you have based upon the information that you have had available in the past for your review, and unfortunately it's not in front of you today. Do you have an opinion as to whether anything Dr. Oglesby did violated the standard of care for a Delaware radiologist under these circumstances?

A. It's very difficult for me to form and [28]consequently relate an opinion of that sort to you without the ability to find the answers to the questions I've just presented.

Q. So is it fair to say, then, Doctor, that absent responses to the questions you've just gone over with me, you are not in a position to render an opinion one way or the other?

A. A tentative opinion, and that would parallel or simulate the same kind of effort that you find in the medical diagnoses. That is, with the material that you have at hand, you may form a tentative diagnosis. As material is collected from the laboratory or X-ray, that may confirm or change your opinion, and so on. That's medical.

I don't know whether that relates to you enough

as an attorney of law to be of any value or fit the theme of this deposition in order to relate it to you.

Q. Doctor, let me ask you a question. You say you have a tentative opinion.

A. Yes.

Q. What is your tentative opinion?

A. The opinion is based on what I see, what I have at hand. And again --

Q. And your have nothing at hand right now.

[29]A. No. It may be changed if I see more material.

The opinion I have is that Dr. Oglesby did not see the patient. I don't see any evidence of that. To me that's a flaw.

Q. You think that's a violation of the standard of care for a radiologist in Delaware?

A. Yes, under these circumstances.

Q. Doctor, you are not a radiologist; correct?

A. That's right.

Q. And you are not licensed to practice medicine in the State of Delaware?

A. That's right.

Q. You say it's a violation of the standard of care under these circumstances. "These circumstances" refer to what?

A. The circumstances are that I don't see the things I have mentioned, the history and physical, in light of succeeding circumstances. Then I think the admission was

flawed in this sense: that it would be reasonable, if not mandatory, for a medical opinion to have been rendered during the admission and in connection with the condition of Mr. Burkhart. I see no evidence that that was done.

[30]MS. CHRISSINGER: I'm sorry. Could I please have that answer read back to me, beginning with the statement, "It would be reasonable, if not mandatory ...."

(The Court Reporter read back as follows:

"Then I think the admission was flawed in this sense: that it would be reasonable, if not mandatory, for a medical opinion to have been rendered during the admission and in connection with the condition of Mr. Burkhart. I see no evidence that that was done.")

BY MS. CHRISSINGER:

Q. A medical opinion to have been rendered by whom, Doctor?

A. An internist, for example; family practitioner; for example. Someone who approached Mr. Burkhart's condition with a sense of his overall condition. By that I mean there is nothing that I see connected with an examination of his heart. There are no laboratory studies. There is nothing to indicate that anyone listened to his lungs, palpated his abdomen, et cetera.

As I said before, it may have been done, but with what I had to review, it wasn't done. And therefore that's what the opinion is based on. Since I don't see

[31]it, then to my mind, that is a flaw.

Q. Assume with me for a moment, Doctor, that your opinion is correct: This is a flaw. What were the consequences of the flaw?

A. The consequences involve the follow-up treatment of Mr. Burkhart. I see that there is not a concrete effort to direct him to anyone to effectively follow up, monitor and fully diagnose his condition.

Q. I'm sorry, Doctor. At the risk of invoking your ire, you completely lost me on that answer. Could you please rephrase it for me?

A. I don't see any concrete all-around effort to direct Mr. Burkhart to some practitioner of medicine or surgery -- medicine and surgery or medicine or surgery --to follow up, to manage his condition and to explore possible diagnoses.

That's different from what I said, but I can't remember. He has it.

Q. What is your diagnosis of Mr. Burkhart's problem following your examination of him in Mr. Berl's office some years ago?

A. That the probability existed that there had been some damage to his arterial and/or neurological system in the area of his abdomen.

[32]Q. What was that damage?

A. The damage would be a disturbance in the full function of either his arterial or neurological system.

Q. How wasn't it fully functioning when you saw him?

A. The difference in sensation.

Q. There was a difference of sensation, but you can't remember whether it was overly sensitive or numb.

A. No.

Q. Just so the record is clear, it's correct that you have no present recollection as to what the difference of sensation was?

A. No.

Q. No, that's not correct, or, no, you don't remember?

A. It is this: I don't remember whether the one side was overly sensitive or underly sensitive compared to the other side.

Q. I think what you are telling us here today, if I can summarize it, is that it was the obligation, in your mind, of Dr. Oglesby, a radiologist, to have made a diagnosis.

A. No. I haven't told you that whatsoever.

[33]Q. Okay. Then why don't you tell me what it is that you are telling me, because, frankly, I'm not sure what it is you are telling me.

A. I told you about twice.

Q. I'm sorry, Doctor. I don't understand it, and I've asked you to repeat it again. What is it that Dr. Oglesby did that he shouldn't have done or didn't do that he should have done?

A. From the evidence I have, I have told you that I

see nothing that connects him with the patient during the hospitalization; that he did not see the
patient. If he didn't see the patient, I don't see how he could make a diagnosis.

Q. Okay.

A. There were no laboratory studies that I saw. There was no information that I could see that Dr. Oglesby could have made a diagnosis long range, with the exception of the discharge summary. But if that's a discharge summary, that comes after the fact. That could well have been written after discharge.

The second item -- and it is in connection with this first item -- is that I don't see an attempt to direct, follow up or manage the complaints that Mr. Burkhart had after his discharge or to direct him [34]to an individual practicing medicine or surgery, or an individual practicing medicine and surgery, to find out the basis -- the cause, that is -- of his problems.

MS. CHRISSINGER: Okay. I think I finally understand. Excuse my thick head.

Thank you, Doctor. I have no other questions for you.

MR. AGOSTINI: I have no questions. MR. BURT: We are done. (Deposition concluded at 1:33 p.m.)

- - -

[35]C E R T I F I C A T E

I, JACK P. WHITE, Official Reporter for the Court of Chancery of the State of Delaware, authorized to administer oaths in Superior Court matters, do hereby certify that the witness, WILLIAM F. HAINES, M.D., after being duly sworn by me, was examined by counsel for the respective parties, and the questions of said witness and his answers were taken down by me in stenotype notes and thereafter transcribed into typewriting under my direction.

I certify that the foregoing is a true and correct transcript of the testimony given at said examination of said witness.

I further certify that reading and signing of the deposition were waived.

I further certify that I am not counsel, attorney or relative of either party, or otherwise interested in the event of this suit.

Official Reporter

Dated: January 15, 1991
Transcribed by:
Ann B. Nolan

DELAWARE SUPERIOR COURT CIVIL RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim or cross-claim, may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment and at any time prior to the marking of the case for trial, move, with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof, subject to the provisions of Rule 56(bb).

(b) For Defending Party. A party against whom a claim, counterclaim or cross-claim is asserted may, at any time prior to the marking of the case for trial, move, with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof, subject to the provisions of Rule 56(bb).

(bb) The limitation of time for the filing of motions for summary judgments in accordance with Rule 56(a) and Rule 56(b) shall not prohibit the filing of a motion for summary judgment by any party when, as a result of a pretrial conference, in the opinion of the Court, the filing of such motion is desirable. This Rule shall not affect in any way the provisions of Rule 12(b) and Rule 12(c) with respect to motions for summary judgment.

(c) Motion and Proceedings Thereon. The motion shall

be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, toghether with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If cn motion under this Rule, judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the Court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be ittached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or affidavits. When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the Court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be talcen or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the Court at any time that any of the affidavits presented pursuant to this Rule are presented in bad faith or solely for the purpose of delay, the Court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(2)

Supreme Court, U.S.
FILED
APR 16 1992
OFFICE OF THE CLERK

No. 91-1495

In The

Supreme Court of the United States

October Term, 1991

ANTHONY J. BURKHART and
CARMELLA L. BURKHART,

Petitioners,

v.

ALLEN L. DAVIES, M.D., JOHN T. OGLESBY, M.D., and MEDICAL CENTER OF DELAWARE, INC., a Hospital Corporation of the State of Delaware,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Delaware

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Should the United States Supreme Court deny certiorari when petitioner has failed to raise or preserve a federal question at the State Court level?

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Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Delaware

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The Respondent Allen L. Davies, M.D., respectfully prays that the petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Delaware be denied.

JURISDICTION

The final judgment of the Delaware Supreme Court was entered on December 20, 1991. Petitioners assert jurisdiction in this Court under 28 U.S.C. § 1257 (1992).

Respondent Davies disputes jurisdiction here because Petitioners failed to raise or preserve any federal question at the state court level. Please refer to Argument I of this Brief.

COUNTER-STATEMENT OF THE CASE

This action was filed in February, 1986. The Petitioners sued respondents Allen L. Davies, M.D., John T. Oglesby, M.D. and the Medical Center of Delaware in Delaware's Superior Court for alleged medical malpractice. Respondents denied liability and discovery ensued.

The Petitioners consistently failed to answer Respondent Davies' interrogatories inquiring as to the identity and opinion of any qualified expert witness prepared to testify that Dr. Davies departed from the applicable standard of care, which proof is necessary to maintain a medical malpractice action pursuant to Delaware Statute. DEL. CODE ANN. tit. 18, § 6853.

The Petitioners twice suffered Trial Court orders compelling identification of expert witnesses and a statement of their opinions and the grounds therefor. To stave off sanctions, the plaintiffs identified seven different doctors as "experts" at various times. The plaintiffs later acknowledged that among those seven doctors, only Dr. William F. Haines of Malvern, Pennsylvania, would testify on the standard of care applicable to Respondent Dr. Davies.

Dr. Haines' deposition was taken only after Dr. Davies obtained a Court order to compel it. At deposition, Petitioners' expert Dr. Haines unequivocally stated that he was not prepared to offer any opinion that Dr. Davies deviated from the standard of care. Eleven days before the scheduled trial, Dr. Haines testified as follows:

> Q. * * * Just to be sure that I understand your answer: today, based on the information that you have seen to date, you are not prepared to offer an opinion that Dr. Davies deviated from the standard of care. Am I correct?
>
> A. Correct.

Transcript of Dr. Haines' testimony, 1/11/91, at 20.[1]

Other testimony of Dr. Haines at deposition was that:

- Dr. Haines was unaware of the trial date eleven days later (Tr.2).
- Dr. Haines had no medical chart materials or other materials with him upon which to base an opinion (Tr.3). Nonetheless, Dr. Haines professed familiarity with the necessary materials (Tr.3-5).
- Dr. Haines first said he had no opinion with respect to whether or not Dr. Davies conformed to the standard of care (Tr.17). He then said he was not prepared to offer an opinion that Dr. Davies deviated from the standard of care (Tr.20).

After Dr. Haines' deposition, it was evident to all concerned that the plaintiff lacked the requisite expert

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[1] References are to page numbers in the original transcripts, as noted in the attachments to the Petition.

testimony to present any case to the jury. Of the other six doctors named as "experts" for the plaintiff at various times, the plaintiff could offer none on standard of care issues.

Plaintiffs' counsel consented to an immediate hearing of Dr. Davies' Motion for Summary Judgment on the Friday before the Tuesday upon which trial was scheduled to begin. Dr. Davies recited in his Motion for Summary Judgment that:

> Undersigned counsel is informed that, if the Court is agreeable, the plaintiff will consent to an immediate hearing of this Motion, to determine whether there remains any need for trial.

Dr. Davies' Motion simply noted that without the requisite expert testimony, the plaintiff could offer no case for a jury determination pursuant to the Delaware statute, and requested dismissal.

At oral argument, plaintiffs' counsel admitted that Dr. Haines was "the only medical witness expert" on the applicable standard of care, and that Dr. Haines "had no clue as to what was going on." He further conceded that:

> [T]he plaintiff does not have a medical expert who can testify that there was a deviation from the standard of care that's required by the statute * * * as to any of the defendants (Transcript of Proceeding, January 17, 1991 at 7-8). I have to agree with the * * * defendants because it is uncontradicted that there isn't the required testimony. * * * I cannot * * * disagree with the defendants that the plaintiffs have not met that requirement. And if trial is held on Tuesday, there'll not be a medical expert witness capable

> of meeting the standard that's required. (Transcript of January 17, 1991 hearing, at p.9-10)

The trial Court granted the motion for summary judgment. The plaintiffs initially appealed to the Delaware Supreme Court *pro se;* two attorneys soon entered appearance for them in that appeal, before briefs were filed. On appeal, the petitioners raised only the following issues:

1. There was a material issue of fact notwithstanding the absence of any expert testimony in support of the allegations in the Complaint;
2. Respondents were required to support their Motions for Summary Judgment with a medical expert's affidavit; and
3. No action on the Motion for Summary Judgment should have been taken in absence of ten (10) days notice.

The Delaware Supreme Court affirmed the Superior Court's order granting summary judgment on December 20, 1991.

No federal questions were presented on the Delaware appeal. The record below is devoid of any references to the United States Constitution or to any federal law.

Petitioners filed a petition for writ of certiorari with the Supreme Court in March of 1992. The sole issue raised by petitioners in this Court is whether the Delaware Supreme Court deprived the petitioners of their federal constitutional due process right to trial by affirming summary judgment when genuine issues of material fact existed. This is the first time this issue has been raised in this

litigation. Petitioners allege jurisdiction pursuant to 28 U.S.C. § 1257 (1992).

REASONS FOR DENYING THE PETITION

1. This Honorable Court lacks jurisdiction. The Petitioners failed to raise or preserve a federal question at the state court level, depriving the Delaware Courts of the opportunity to pass on the alleged due process issue. *Webb v. Webb*, 451 U.S. 493 (1981).

2. Grant of summary judgment constituted due process of law. Summary Judgment was properly granted because the Petitioners' proof completely failed concerning an essential element of their case, and all other facts were therefore rendered immaterial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

I. THIS COURT IS WITHOUT JURISDICTION BECAUSE THE PETITIONERS FAILED IN THE STATE COURTS TO RAISE OR PRESERVE THE CONSTITUTIONAL BASIS THEY NOW ASSERT FOR GRANT OF CERTIORARI.

The United States Supreme Court's power to review final judgments rendered by State Courts is set forth at 28 U.S.C. § 1257 (a), which provides in pertinent part:

> Final judgments or decrees rendered by the highest Court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the Constitution * * * of * * * the United States.

Section 1257 "requires that in the State Courts Petitioner have 'specially set up or claimed under the Constitution * * * of * * * the United States' that right which she now seeks to have this Court enforce. 28 U.S.C. § 1257 (3)." *Webb v. Webb*, 451 U.S. 493 (1981).[2]

Webb was a child custody dispute in which Florida and Georgia had inconsistently awarded custody, Florida to the Petitioner and Georgia to the Respondent. The Petitioner sought the United States Supreme Court's determination of whether United States Constitution Article IV, Section 1 required Georgia to give full faith and credit to the earlier Florida decree. Relying on the Petitioner's assertion that the federal question had been properly raised in the Georgia courts, and on the Respondent's failure to contest jurisdiction, the Court granted certiorari, only to later discover a jurisdictionally disabling flaw:

> We are * * * largely dependent upon the assertions made by the parties as to what [the] record will demonstrate concerning the manner in which a federal question was raised below.

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[2] Between Your Honorable Court's opinion in *Webb* and the Delaware Supreme Court's determination of the present case, 28 U.S.C. § 1257 was amended by the Supreme Court Case Selections Act (Public Law 100-352), which became effective June 27, 1988. All of the old contents were stricken out and a fresh § 1257 was enacted in their place. The substantive effect of § 1257 on the present case is unchanged. The old paragraphs (1) and (2), authorizing appeal, were eliminated and only the certiorari procedure (previously contained in paragraph 3) was retained. The old paragraph (3), without changing substance, became subdivision (a) in the new § 1257. Thus, the *Webb* opinion's reference to 28 U.S.C. § 1257 (3) presently refers to 28 U.S.C. § 1257 (a).

> Because Petitioner forthrightly asserted that the federal question had been raised and this assertion was not disputed by the Respondent, we assumed that there would be no jurisdictional problem in reaching the issue raised by the Petition, and we granted certiorari. 449 U.S. 819. It has become clear, however, that the Federal question was not raised below and that we are without jurisdiction in this case. We must therefore dismiss without reaching the merits.

Webb, 451 U.S. at 494-95.

In the present case, the Petitioners do not go so far as to claim that the Fourteenth Amendment due process issue they press was in fact raised before either the Delaware Trial or Supreme Courts. They apparently concede that it was not. Rather than identifying the stage of the proceedings at which the due process issue was first allegedly raised, at page (ix) of their Petition, they suggest this Court has jurisdiction in *every* case where in construing a state statute a state court allegedly fails to guard, enforce, and protect every right granted or secured by the Constitution of the United States, regardless of Petitioners' failure to press a particular federal constitutional right in the state court.

The present Petitioners' failure to raise or preserve the asserted Federal constitutional right is more marked than that of the Petitioners in *Webb*. After a full review of Petitioners' briefs and the transcripts of prior proceedings below, this Court in *Webb* determined that while the Petitioner had used the phrase "full faith and credit" "at several points in the proceedings below, nowhere did she cite to the Federal Constitution or to any cases relying on

the Full Faith and Credit clause of the Federal Constitution." *Webb* at 496. Citing a longstanding rule of procedure, the Court stated that "Th[is] Court has consistently refused to decide Federal constitutional issues raised here for the first time on review of State Court decisions." *Id.* at 499, quoting *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). "We have had several occasions to repeat this rule since then, [citations omitted] and we see no reason to deviate from it now." *Id.*

As the Court said in *Webb*, there are "powerful policy considerations underlying the statutory requirement and our own rule that the Federal challenge to a State statute or other official act be presented first in the State Courts." *Id.* at 499. Principles of comity and federal respect for state sovereignty require that the state Courts be afforded the opportunity to first perform their duty, including responding to attacks on state authority based on federal law. *Id.*

> At the minimum * * * there should be no doubt from the record that a claim under a *Federal* statute or the *Federal* constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court. *Id.* at 501. [Emphasis in original.]

The Court cited other factors supporting this policy, including the importance of affording the parties below the chance to prepare a proper record, and conservation of judicial resources.

In the present case, the Petitioners failed to raise below the federal due process question they now press, thereby depriving the parties of any opportunity to develop a record, and further depriving the Delaware Courts of any opportunity to pass on the issue. It may not be newly raised now.

For the reasons given, this Court lacks jurisdiction over the question presented by the Petitioners, and should therefore deny the Petition for Certiorari.

II. SUMMARY JUDGMENT WAS PROPERLY GRANTED BELOW IN A MANNER SATISFYING ANY DUE PROCESS CONCERNS

In a medical malpractice case, Delaware imposes on the plaintiff the statutory requirement that:

> No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death * * * . DEL. CODE ANN. tit. 18, § 6853.

Below, the Petitioners entirely failed to meet the requirement of § 6853. They can only concede that on the eve of trial their only expert designated to testify on standard of care issues at trial, was completely unprepared to testify that Respondent Dr. Davies deviated from the applicable

standard of care. Eleven days before trial, Dr. Haines so testified at deposition. Four days before trial was to begin, Petitioners' trial attorney conceded in open court that Petitioners utterly lacked qualified expert testimony that any of the present Respondents deviated from the applicable standard of care, and therefore lacked essential proof to meet their burden under DEL. CODE ANN. tit. 18, § 6853.

Delaware Superior Court Civil Rule 56, Summary Judgment, is substantially identical to Federal Civil Rule of Procedure 56. Subsection (c) provides in relevant part that:

> (c) * * * [T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The Statute DEL. CODE ANN. tit. 18, § 6853 is explicit that no genuine issue of material fact requires submission to the jury if the plaintiff does not produce an expert capable to testify that the defendant violated the applicable standard of care. Expert proof of deviation from the applicable medical standard of care was an element essential to Petitioners' case below, on which they would have borne the burden of proof at trial. Where, as here, such proof is absent, Rule 56 makes it plain that summary judgment is in order, and "shall be rendered forthwith."

The United States Supreme Court has confirmed that under Rule 56, where plaintiffs fail to make a showing sufficient to establish the existence of an element essential to their case, and on which they will bear the burden of proof at trial, there can be no genuine issue as to *any* material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 323 (1986). A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. Therefore, the moving party is entitled to judgment as a matter of law.[3]

A review of the material attached to the Petition for a Writ of Certiorari leaves no question that if Respondent Davies had moved for a directed verdict at the close of the plaintiffs' case, that motion would have been granted because the plaintiff would not have made out a sufficient case under DEL. CODE ANN. tit. 18, § 6853 for lack of the required expert testimony. The comments of the Trial Judge at the January 17, 1991 hearing reflect his complete lack of discretion under the facts presented. Addressing Mr. Burkhart, the Court said:

> I know your attorneys have explained the law to you and I'm sure you must know that the Medical Care – Health Care Malpractice Act provides, and I'll quote it for you, "No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care." And that's a law enacted by the Legislature which applies to this case. And there is nothing that I can do about it or your attorneys can do about it or anybody else can do about it, except apply it.

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[3] Petitioners' review of the facts of the *Celotex* case completely ignores its central rule.

> And you have a case where your claiming that – medical practice [sic] and there's no expert witness who is prepared to support that allegation. And as a consequence, the Motion will have to be granted. (Tr. at 10-11.)

The Court was following a clear legislative mandate which dictated a result under the uncontested facts before it.

The grant of summary judgment in this case, and its affirmance, correctly reflect that the standard for granting a motion for summary judgment mirrors the standard for a directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 at 250 (1986). Where a Trial Court would be duty bound to direct a verdict for the defendant, it is correct in entering summary judgment where an essential element of proof would necessarily fail at trial.

This Honorable Court has recognized that due process concerns are satisfied by properly granted Summary Judgment under Rule 56:

> Summary Judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal rules as a whole which are designed "to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327.

The Delaware Supreme Court properly and explicitly relied on *Celotex* in affirming the Trial Court's grant of summary judgment. Even if jurisdiction in the United States Supreme Court were proper, any due process concerns were satisfied below.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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